

SEAN D. LUSK,)	Case No. CV 15-6783-JGB (KK)
)	
Plaintiff,)	
)	
v.)	ORDER DISMISSING SECOND
)	AMENDED COMPLAINT WITH
)	LEAVE TO AMEND
)	
E. VALENZUELA, et al.,)	
)	
Defendants.)	

INTRODUCTION

///

II.

PROCEDURAL BACKGROUND

A. ORIGINAL COMPLAINT

On August 27, 2015, Plaintiff, an inmate at California Men's Colony ("CMC"), constructively filed¹ his original civil rights complaint pursuant to Section 1983. See Dkt. 1. Plaintiff alleged defendants E. Valenzuela and M. Denton ("Defendants") violated his Eighth Amendment rights by failing to repair damaged flooring at CMC. See id. On September 11, 2015, the Court dismissed the complaint with leave to amend for failure state an Eighth Amendment violation. See Dkt. 9, Order Dismissing Compl.

B. FIRST AMENDED COMPLAINT

On November 19, 2015, Plaintiff constructively filed a First Amended Complaint ("FAC"). See Dkt. 16, FAC. Plaintiff again alleged Defendants violated his Eighth Amendment rights by failing to repair damaged flooring at CMC. See id. On December 4, 2015, the Court dismissed the FAC with leave to amend for failure to state an Eighth Amendment violation. See Dkt. 17, Order Dismissing FAC.

C. SECOND AMENDED COMPLAINT

On January 15, 2016, Plaintiff constructively filed a Second Amended Complaint ("SAC") against Defendants in their individual capacities. See Dkt. 22, SAC.

¹ Under the "mailbox rule," when a pro se inmate gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted); Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009) (stating the "mailbox rule applies to § 1983 suits filed by pro se prisoners"). Here, Plaintiff signed and dated his complaint on August 27, 2015. See ECF Docket No. ("Dkt.") 1, Compl. Thus, the Court deems August 27, 2015 the filing date.

1 **III.**

2 **ALLEGATIONS OF THE SAC**

3 In the SAC, Plaintiff, once again, alleges Defendants violated his Eighth
4 Amendment rights by failing to repair damaged flooring at CMC with deliberate
5 indifference. Id. Plaintiff alleges defendant Valenzuela was CMC's warden and
6 "responsible for ensuring the safety and well-being of prisoners under his
7 supervision." Id. at 9.² Plaintiff alleges defendant Denton was CMC's
8 "Superintendent of Building Trades" and "responsible for the supervision of
9 subordinate [m]aintenance employees for [CMC's] West Facility." Id.

10 Plaintiff alleges he worked as an Inmate Assistant Lead Cook in CMC's
11 West Central Kitchen on March 14, 2015. Id. at 10. Plaintiff alleges linoleum
12 floor in CMC's "'F' facility diner" was raised and ripped in a half-inch to one-inch
13 area, but "[t]here was no warning sign, nor had there been, indicating the floor was
14 damaged." Id. Plaintiff alleges while working that day, "[t]he break in the
15 damaged flooring caught and trapped Plaintiff's left foot" and he consequently lost
16 his balance, tripped, slipped, spun, hit the corner of a table, and fell onto the floor.
17 Id. at 11. After obtaining medical treatment, Plaintiff learned "he had suffered a
18 lower back contusion and strain, consist[e]nt with that of being in an auto
19 accident." Id. at 13.

20 Plaintiff alleges defendant Valenzuela "has allowed known longstanding
21 hazardous work conditions posing excessive risk of serious harm to exist
22 uncorrected, due to inconvenience of 'back log of work orders and lacking enough
23 person[ne]l to correct those hazardous conditions.'" Id. at 20-21. Plaintiff alleges
24 defendant Denton "fail[ed] to make repairs over 6 1/2 months despite being
25 informed of the defective hazardous work condition and through his own
26

27 ² The Court refers to the pages of the SAC as if Plaintiff consecutively
28 numbered them.

1 [ad]mission failed to act in a timely manner due to inconvenience of ‘backlog of
 2 work orders and a prior staff vacancy.’” Id. at 15. Plaintiff attaches to the SAC a
 3 Memorandum in which CMC Associate Warden of Business Services T. King
 4 states he interviewed defendant Denton about the damaged flooring on June 29,
 5 2015 and defendant Denton “stated the delay in completing the work was due to a
 6 prior staff vacancy in the Carpenter Shop and backlog of work orders.” Dkt. 22-1,
 7 Attachment at 4-5.

8 Plaintiff seeks declaratory judgment, compensatory damages, punitive
 9 damages, an order requiring Defendants to pay Plaintiff’s court fees and costs, and
 10 “such other relief that this honorable court deems necessary.” Dkt. 22 at 32-33.

11 IV.

12 STANDARD OF REVIEW

13 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a
 14 complaint for failure to state a claim upon which relief can be granted. Fed. R.
 15 Civ. P. 12(b)(6). The Ninth Circuit has held “[a] trial court may dismiss a claim
 16 sua sponte under Fed. R. Civ. P. 12(b)(6)” and has also stated “[s]uch a dismissal
 17 may be made without notice where the claimant cannot possibly win relief.” Omar
 18 v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987) (citing Wong v. Bell,
 19 642 F.2d 359, 361-62 (9th Cir. 1981)).

20 A complaint may be dismissed for failure to state a claim “where there is no
 21 cognizable legal theory or an absence of sufficient facts alleged to support a
 22 cognizable legal theory.” Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007)
 23 (citation and internal quotation marks omitted). In considering whether a
 24 complaint states a claim, a court must accept as true all of the material factual
 25 allegations in it. Hamilton v. Brown, 630 F.3d 889, 892-93 (9th Cir. 2011).
 26 However, the court need not accept as true “allegations that are merely conclusory,
 27 unwarranted deductions of fact, or unreasonable inferences.” In re Gilead Scis.
 28 Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (citation and internal quotation

marks omitted). Although a complaint need not include detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation and internal quotation marks omitted). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (citation and internal quotation marks omitted).

“A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (citations and internal quotation marks omitted); Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir. 2008). If, however, the court finds a pro se complaint should be dismissed for failure to state a claim, the court has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). A district court’s denial of leave to amend is “particularly broad” where a plaintiff fails to cure the deficiencies identified by the court despite being granted multiple opportunities to do so. See Chodos v. W. Publ’g Co., 292 F.3d 992, 1003 (9th Cir. 2002) (internal quotation marks and citation omitted).

V.

DISCUSSION

PLAINTIFF FAILS TO ALLEGE DEFENDANTS’ SUPERVISORY LIABILITY

A. Applicable Law

Because vicarious liability fails to apply to Section 1983 actions, “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Ashcroft v. Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A defendant may be held liable as

1 a supervisor only “if there exists either (1) his or her personal involvement in the
2 constitutional deprivation, or (2) a sufficient causal connection between the
3 supervisor’s wrongful conduct and the constitutional violation.” Starr v. Baca, 652
4 F.3d 1202, 1207 (9th Cir. 2011) (internal quotation marks and citations omitted).

5 Accordingly,

6 Even under a “deliberate indifference” theory of individual liability,
7 the [p]laintiff[] must still allege sufficient facts to plausibly establish
8 the defendant’s “knowledge of” and “acquiescence in” the
9 unconstitutional conduct of his subordinates. In short, . . . “bald” and
10 “conclusory” allegations are insufficient to establish individual
11 liability under 42 U.S.C. § 1983.

12 Hydrick v. Hunter, 669 F.3d 937, 942 (9th Cir. 2012) (internal quotation marks and
13 citations omitted). Moreover, even “[i]f a person should have been aware of the
14 risk, but was not, then the person has not violated the Eighth Amendment, no
15 matter how severe the risk.” Gibson v. Cty. of Washoe, Nev., 290 F.3d 1175, 1188
16 (9th Cir. 2002).

17 **B. Analysis**

18 Here, Plaintiff fails to plead defendant Valenzuela violated the Constitution
19 through his own actions. See Iqbal, 556 U.S. at 676. Rather, Plaintiff alleges
20 defendant Valenzuela was CMC’s warden and “responsible for ensuring the safety
21 and well-being of prisoners under his supervision.” Dkt. 22 at 9. Plaintiff fails to
22 allege defendant Valenzuela had personal involvement in the alleged Eighth
23 Amendment violation, or a sufficient causal connection between any of defendant
24 Valenzuela’s wrongful conduct and the alleged violation. See Starr, 652 F.3d at
25 1207. Further, Plaintiff fails to allege defendant Valenzuela personally knew about
26 the damaged flooring, or identify unconstitutional conduct by any of defendant
27 Valenzuela’s subordinates of which defendant Valenzuela had notice or in which
28 he was personally involved. See Hydrick, 669 F.3d at 942. To the extent Plaintiff

1 alleges defendant Valenzuela's responsibility for prisoners under his supervision
2 demonstrates he should have known about the risk the damaged flooring posed,
3 this allegation is insufficient. See Gibson, 290 F.3d at 1188. Thus, Plaintiff's bald
4 and conclusory allegations against defendant Valenzuela are insufficient to
5 establish individual liability under Section 1983.

6 In addition, Plaintiff fails to plead defendant Denton violated the
7 Constitution through his own actions. Dkt. 22 at 9. Plaintiff alleges defendant
8 Denton was CMC's "Superintendent of Building Trades" and "responsible for the
9 supervision of subordinate [m]aintenance employees for [CMC's] West Facility."
10 Id. Construed liberally, Plaintiff also alleges defendant Denton personally knew
11 about the damaged flooring by attaching the Memorandum showing King
12 interviewed defendant Denton on June 29, 2015 about the damaged flooring. See
13 Dkt. 22-1 at 4-5. However, Plaintiff fails to show defendant Denton had personal
14 involvement in the alleged Eighth Amendment violation or a sufficient causal
15 connection between any of defendant Denton's wrongful conduct and the alleged
16 violation. See Starr, 652 F.3d at 1207. Further, Plaintiff fails to show defendant
17 Denton acted unconstitutionally, any of defendant Denton's subordinates acted
18 unconstitutionally, or defendant Denton acquiesced in any such unconstitutional
19 conduct. See Hydrick, 669 F.3d at 942. Thus, Plaintiff's bald and conclusory
20 allegations against defendant Denton are insufficient to establish individual
21 liability under Section 1983.

22 VI.

23 ORDER

24 For the foregoing reasons, the SAC is subject to dismissal. However, as the
25 Court is unable to determine whether amendment would be futile, leave to amend
26 is granted. See Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995).

27 Accordingly, IT IS ORDERED, Plaintiff may file a Third Amended
28 Complaint ("TAC") by **February 24, 2016**. If Plaintiff chooses to file a TAC,

1 Plaintiff must clearly designate on the face of the document that it is the “Third
 2 Amended Complaint,” it must bear the docket number assigned to this case, and it
 3 must be retyped or rewritten in its entirety, preferably on the court-approved form.
 4 Plaintiff shall not include new defendants or new allegations that are not
 5 reasonably related to the claims asserted in the Complaint. In addition, the TAC
 6 must be complete without reference to the Complaint, FAC, SAC, or any other
 7 pleading, attachment, or document. **The Clerk of Court is directed to mail**
 8 **Plaintiff a Central District civil rights complaint form to use for filing the**
 9 **TAC, which the Court encourages Plaintiff to use.**

10 An amended complaint supersedes the preceding complaint. Ferdik v.
 11 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will
 12 treat all preceding complaints as nonexistent. Id. Because the Court grants
 13 Plaintiff leave to amend as to all his claims raised here, any claim raised in a
 14 preceding complaint is waived if it is not raised again in the TAC. Lacey v.
 15 Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012).

16 Because this will be Plaintiff’s third opportunity to amend his complaint to
 17 rectify pleading deficiencies, the Court advises Plaintiff that it generally will not be
 18 well-disposed toward another dismissal with leave to amend if Plaintiff files a TAC
 19 that continues to include claims on which relief cannot be granted. “[A] district
 20 court’s discretion over amendments is especially broad ‘where the court has
 21 already given a plaintiff one or more opportunities to amend his complaint.’”
 22 Ismail v. County of Orange, 917 F. Supp. 2d 1060, 1066 (C.D. Cal. 2012)
 23 (citations omitted); see also Ferdik, 963 F.2d at 1261. E.g., Kaplan v. Rose, 49
 24 F.3d 1363, 1370 (9th Cir. 1994) (“Kaplan has already amended the complaint
 25 twice”); Zavala v. Bartnik, 348 F. App’x 211, 213 (9th Cir. 2009) (“Dismissal
 26 with prejudice was proper because Zavala was given two prior opportunities to
 27 amend his complaint in order to correct the deficiencies identified by the district
 28 court but failed to do so.”); Smith v. Solis, 331 F. App’x 482, 482-83 (9th Cir.

1 2009) (“The district court properly dismissed the action with prejudice because
2 Smith’s second amended complaint did not state a claim for deliberate indifference
3 and Smith failed to correct the defects.”). Thus, if Plaintiff files a TAC with claims
4 on which relief cannot be granted, the TAC will be dismissed without leave to
5 amend and with prejudice.

6
7
8 DATED: FEBRUARY 3, 2016

A handwritten signature in black ink, appearing to read "Kenly Kiya Kato", written over a horizontal line.

HONORABLE KENLY KIYA KATO
UNITED STATES MAGISTRATE JUDGE